

BEFORE THE UNITED STATES
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Application of)
)
)

VIRGIN AMERICA INC.)
)

Docket No. OST-2005-23307

for a Certificate of Public Convenience)
and Necessity under 49 U.S.C. § 41102 to)
engage in interstate scheduled air transportation)
_____)

Petition of)
)
)

ALASKA AIRLINES INC.)
)

Docket No. OST-2009-0037

to institute a public inquiry into the citizenship)
and control of Virgin America, Inc.)
_____)

ANSWER OF VIRGIN AMERICA INC. TO MOTION OF ALASKA AIRLINES, INC.

Communications with respect to this document should be sent to:

David Cush
Chief Executive Officer
David H. Pflieger, Jr.
General Counsel
Virgin America Inc.
555 Airport Blvd
Burlingame, CA 94010

Kenneth P. Quinn
Jennifer Trock
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Tel: (202) 663-8000
Fax: (202) 663-8007
E-mail: kquinn@pillsburylaw.com
jtrock@pillsburylaw.com

Counsel for VIRGIN AMERICA INC.

March 24, 2009

BEFORE THE UNITED STATES
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

<hr/>)	
Application of)	
)	
VIRGIN AMERICA INC.)	
)	Docket No. OST-2005-23307
for a Certificate of Public Convenience)	
and Necessity under 49 U.S.C. § 41102 to)	
engage in interstate scheduled air transportation)	
<hr/>)	

<hr/>)	
Petition of)	
)	
ALASKA AIRLINES INC.)	
)	Docket No. OST-2009-0037
to institute a public inquiry into the citizenship)	
and control of Virgin America, Inc.)	
<hr/>)	

ANSWER OF VIRGIN AMERICA INC. TO MOTION OF ALASKA AIRLINES, INC.

Virgin America Inc. (“Virgin America”) hereby submits the following Answer to the March 12, 2009 Motion for Leave to File (“Motion”) and unauthorized Reply of Alaska Airlines, Inc. (“Alaska”).¹ Alaska’s Motion desperately seeks now not only a public continuing fitness review of Virgin America, despite overwhelming precedent to the contrary, but also adds a request for a Show Cause Order to ultimately ground Virgin America based on inaccurate and unsubstantiated media reports. As the Department is well aware, no sale or transfer of the 75% U.S. citizen controlling equity in Virgin America has occurred, U.S. citizens remain fully at the helm of this U.S. air carrier, and the law and all applicable agreements preclude the transfer of

¹ To the extent deemed necessary by the Department, Virgin America seeks leave to file its Answer one day late. Virgin America respectfully submits that consideration of its response is in the public interest, will not prejudice the parties, and will provide a more complete record for the Department’s review.

such equity to any non-U.S. citizens. For these and the following reasons, the Department should deny this Motion and dismiss in its entirety all of Alaska's frivolous efforts to enlist governmental help to shut down competition in Seattle and elsewhere.

First, as an initial matter, Virgin America objects to the untimely and unauthorized reply of Alaska and urges the immediate denial of its Motion and dismissal of both this latest request and Alaska's original petition. Alaska filed its petition on February 10, 2009. Virgin America filed its Answer on February 20, 2009, along with other parties. The record here was ripe for decision four weeks ago. But Alaska, now citing an inaccurate *Wall Street Journal* article, which repeatedly cited unnamed sources supposedly "familiar with the situation," wrongly claimed a sale of the U.S. citizen shares in Virgin America to justify an unauthorized filing on March 12, 2009.² As Alaska is well aware, no "sale" of stock can occur under the transaction documents that formed the basis for the Department's conclusion – after nearly 18 months of comprehensive public review – that Virgin America was a U.S. citizen.³ As Virgin America has previously made clear, it has kept (and will continue to keep) the Department fully informed of any changes requiring notification, and it will cooperate fully with the Department in any ongoing fitness and citizenship matters that may be required.

Alaska cites and republishes the anonymous misinformation as the basis for its request for extraordinary relief to urge the Department to ground Virgin America,⁴ in the hopes of setting aside the Department's well-reasoned determination in Virgin America's certification proceeding. Alaska's counsel filled out confidentiality affidavits during that proceeding in an effort to gain access to all of the transaction documents in Virgin America's certification, yet it

² Motion at 1.

³ Docket OST-2005-23307.

⁴ *Alaska Airlines Again Calls On U.S. Department Of Transportation To Address Questions About Virgin America's Compliance With Foreign Ownership Laws*, Alaska Airlines Press Release, available at http://www.alaskasworld.com/Newsroom/ASNews/ASstories/AS_20090312_083726.asp (Mar. 12, 2009).

now conveniently ignores them. Any cursory review of those agreements would reveal that any “sale” of U.S. equity shares to a non-U.S. citizen is impossible. Accordingly, the Department should move quickly to deny Alaska’s Motion and dismiss Alaska’s various petitions.

Second, Alaska’s Motion for the Department to issue a Negative Show Cause Order should be denied. As the Department knows, Virgin America has, and will continue to, comply fully with any notification requirements to the Department to provide information needed to evaluate its continuing fitness. That process should proceed as precedent warrants here: confidentially and informally, avoiding the creation of opportunities for competitor mischief. Where the Department has issued a Show Cause Order proposing to cancel authority based on legitimate citizenship concerns, it has generally been as a matter of last resort after extended periods of attempting to resolve the issues with the applicant.⁵

Third, perhaps because it did not actively participate in the 18-month long proceeding that established Virgin America’s citizenship, Alaska seems hopelessly confused about not only the mechanism for the exercise of any redemptive rights, but also the nature and purpose of the voting trust set up for minority investor shares. Alaska incorrectly characterizes the U.S. Investors’ ownership interests as voting trusts, when none of the U.S. citizen equity shares are held in trust, which Alaska knows from the original citizenship proceeding.

Fourth, Alaska equally misperceives the effect of any puts. As previously explained, the Put Agreements were thoroughly reviewed by the Department and aggressively argued by the

⁵ For example, in *Wrangler Aviation*, the Department finally issued a Show Cause Order nearly three years after it first instituted an informal review of the carrier’s fitness. See *In the Matter of the Cancellation of the Operating Authority Issued to Wrangler Aviation, Inc.*, Order 93-7-26, Docket No. 49038, at 1-2 (Jul. 15, 1993) (noting that the Department had instituted an informal review on November 13, 1990). While it was informally reviewing Wrangler’s citizenship, the Department dismissed a petition like that of Alaska seeking a formal review of the carrier’s citizenship. *Id.* at 2.

parties commenting on Virgin America's certification.⁶ The Department also took into account the possibility that the puts might be exercised when it determined that Virgin America met U.S. citizenship requirements.⁷ As Virgin America explained in the certification proceeding, the Put Agreements were specifically structured to address U.S. citizenship requirements, and, if exercised, they would preclude transfer of interests until the Department has reviewed and approved any new U.S. investors.⁸

Fifth, as Virgin America has discussed in its previous filings, debt, even in large amounts, does not constitute impermissible levels of foreign control.⁹ Virgin America's debt agreements were long ago stripped of restrictive covenants that could allow foreign creditors to exercise impermissible control, and all such agreements have been reviewed and accepted by the Department.¹⁰

Alaska has raised nothing new in its Motion, and just like in its initial Petition, no reason to institute a public proceeding exists. Nothing unforeseen to the Department has occurred, and Virgin America has met and continues to meet all of its notification requirements.¹¹ Consistent with Department precedent, the Department should not institute a public proceeding where an informal review is more appropriate.¹² Nor should it issue a Show Cause Order to ultimately

⁶ *Answer of Virgin America Inc. to Petition of Alaska Airlines Inc.*, Docket OST-2009-0037, at 4-5 (Feb. 20, 2009).

⁷ *Application of Virgin America, Inc.*, Order 2007-3-16, Docket OST-2005-23307, at 59-60 (Mar. 20, 2007) ("Show Cause Order").

⁸ *See Objections of Virgin America Inc.*, Docket OST-2005-23307, at 95 (Jan. 17, 2007).

⁹ *How to Become a Certificated Air Carrier*, Department of Transportation Information Packet, at 15 (May 2005). *See also In the Matter of the Acquisition of Northwest Airlines, Inc. by Wings Holdings, Inc.*, Order 91-1-41, Docket No. 46371, at 9 (Jan. 23, 1991).

¹⁰ Show Cause Order at 55.

¹¹ As re-issued by Order 2007-8-17, Docket OST-2005-23307 (Aug. 17, 2007).

¹² *Petition for an Investigation into the Continuing Fitness of Wrangler Aviation, Inc.*, Order 91-12-51, Docket No. 47291, at 2-3 (Dec. 31, 1991) ("We have found that it is generally more appropriate and efficient to resolve citizenship issues through an informal fitness review rather than an enforcement proceeding or a formal proceeding. That general approach is especially applicable here, as an informal continuing fitness investigation is already underway.").

ground a rapidly expanding, competitive, and innovative U.S. carrier that currently employs over 1,400 people nationwide.

Alaska has demonstrated that it can do no more than tell the Department what has been publicly reported in the press, but has not otherwise provided any basis to justify either its initial Petition or its subsequent Motion.

For the foregoing reasons Virgin America respectfully requests that the Department deny Alaska's various petitions and requests, including denial of its latest unauthorized pleading.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth P. Quinn". The signature is fluid and cursive, with the first name "Kenneth" being more legible than the last name "Quinn".

Kenneth P. Quinn
Jennifer E. Trock
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Tel: (202) 663-8000
Fax: (202) 663-8007
E-mail: kquinn@pillsburylaw.com
jtrock@pillsburylaw.com

Counsel for VIRGIN AMERICA INC.

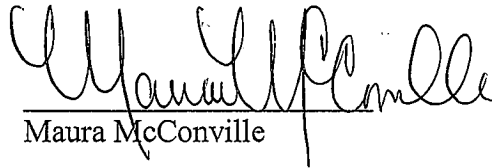
March 24, 2009

CERTIFICATE OF SERVICE

I, Maura McConville, hereby certify that I have this, the 24th day of March 2009, caused a copy of the foregoing document to be served on the following persons via electronic mail:

scott.mcclain@delta.com
sanetta.c.barnett@delta.com
bkeiner@crowell.com
sascha.vanderbellen@delta.com
bruce.rabinovitz@wilmerhale.com
jonathan.moss@wilmerhale.com
bob.kneisley@wnco.com
robert.land@jetblue.com
anbird@fedex.com
dvaughan@kelleydrye.com
kevin.montgomery@polaraircargo.com
jrichardson@johnlrichardson.com
lhalloway@crowell.com
efaberman@wileyrein.com
mroller@rollerbauer.com
howard_kass@usairways.com
benjamin.slocum@usairways.com
jhill@dowlohnes.com
bill@mietuslaw.com
mgoldman@sbgdc.com
dhainbach@ggh-airlaw.com
mcmillin@woa.com
mchopra@jamoff.com
Russell.bailey@alpa.org
dkirstein@yklaw.com
jyoung@yklaw.com
Donna.kooperstein@usdoj.gov
Dwight.moore@ustranscom.mil
reohn@hhlaw.com
cjsimpson@zsrlaw.com
pmurphy@lopMurphy.com
slachter@lachter-clements.com
anita.mosner@hklaw.com

egilmartin@afanet.org
pfriend@afanet.org
ohernstadt@iamaw.org
lseham@ssmplaw.com
msinick@ssd.com
esauer@ssd.com
sjollie@verizon.net
ssmpls@aol.com



Maura McConville